Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

BENNIE ROZMAN,
d/b/a LYNDE INVESTMENT COMPANY,
Petitioner,
SUSAN RODRIGUEZ, SHERRI BONIARCZYK,
Intervenor Plaintiff,
v.
CITY OF COLUMBIA HEIGHTS,
JOSEPH STURDEVANT, WALT FEHST, MEG JONES,
ROBERT W. REUTTIMANN, CHARLES KEWATT,
LOWELL G. DEMARS, MATT D.FIELD, GARY
GORMAN, and ROLLIN GOLDSBERRY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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60 pp

QUESTION PRESENTED

This Court has long held that "on summary judgment the inferences to be drawn from the underlying facts contained in such materials (affidavits, depositions and exhibits) must be viewed in the light most favorable to the party opposing the motion." *U.S. v. Diebold, Inc.* 369 U.S. 654, 655 (1962). This Court has also long held that a court considering a motion for summary judgment must view all facts in the light most favorable to the non-moving party and give to the non-moving party the benefit of all reasonable inferences that can be drawn from the facts. *Matsushita Elec. Industry. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

In this case, the Eighth Circuit not only viewed the facts presented in a manner which was most favorable to the *moving* party, but it also made factual "assumptions" in the moving party's favor.

The question presented is whether a genuine issue of material fact exists to preclude the entry of summary judgment against Petitioner's claim that his substantive due process rights were violated by City Respondent.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Bennie Rozman, d/b/a Lynde Investment Company, states that it is not a corporation certified under the laws of the State of Minnesota or any other state, has no corporate parents, and that no publicly held company owns 10% or more of Lynde Investment Company.

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PETITION OF A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, en banc, in this case.

OPINIONS BELOW

The Order of the United States District Court, District of Minnesota, (per Rosenbaum, J.M.) denying Petitioner's motion for declaratory and permanent injunction is not otherwise published. The Memorandum Opinion and Order of the United States District Court, District of Minnesota, (per MacLaughlin, H.H.) granting City Respondent's motion for summary judgment and denying Petitioner's motion for summary judgment is not otherwise published. The Opinion of the United States Court of Appeals for the Eighth Circuit, (per McMillian, Bright and Wood) affirming the district court's opinion is published at 220 F.3d 864. The Order of the United States Court of Appeals for the Eighth Circuit, granting en banc review is not otherwise published. The Opinion of the United States Court of Appeals for the Eighth Circuit, en banc, is not yet published but is reported at 2001 WL 1195130.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighth Circuit, en banc, entered its opinion and order on October 11, 2001. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the 5th Amendment to the United States Constitution: No person shall be held to answer for a capital, or otherwise infamous crime, unless

on a presentment or indictment of a Grand Jury, except in cases arising in the land or navel forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the 14th Amendment to the United States Constitution: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

The decision below conflicts with the previous decisions of this Court and further, in effect, supports the action of a municipality which clearly violates the rule of law set forth by this Court in *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967). As discussed below, the lower courts have so far departed from the accepted and usual course of judicial proceedings that exercise of this Court's supervisory power is warranted and respectfully requested.

1. Petitioner, Bennie Rozman, d/b/a Lynde Investment Company, owns and manages twelve residential rental properties in the City of Columbia Heights, Minnesota. The twelve properties contain 134 separate dwelling units. Petitioner has engaged in the rental property management business for over 35 years.

In 1994, the City of Columbia Heights ("City") modified its Housing Maintenance Code ("Code") to require annual inspections of all rental dwelling units located within its borders by agents of the City. Section 59-5A.301 of the Code allows the City Manager or his/her designated agents to enter, for the purpose of inspection, any rental dwelling unit or premises upon twenty-four hour notice. Pet. App. 40a. The Code does not give the City like authority to enter single family homes for interior inspection. The Code is silent on how the City should obtain permission to enter each individual rental unit. However, Section 59-5A.603 and Section 59-5A.608 of the Code provide that a property owner's failure to grant the City unlimited access into each dwelling unit, regardless of tenant consent, will subject the property owner to license revocation and criminal prosecution. Pet. App. 40a-41a.

The City contacted Petitioner during the summer of 1996 for an annual inspection. Petitioner allowed the City access and entry into all twelve buildings for inspection of the exterior and common areas. However, Petitioner refused to open any individual tenant's door without proof of consent to such entry by each tenant residing therein or a valid search warrant. The City refused to obtain either permission from each tenant or a search warrant and continued to insist that Petitioner grant it unrestricted access into each tenant's home. Petitioner again informed the City that he would allow such access only upon its first obtaining the permission of each individual tenant or providing a search warrant.

2. On or about December 9, 1996 the City notified Petitioner that a license revocation hearing was scheduled for Petitioner's refusal to allow *access* into his tenants' homes for the City inspections. Pet. App. 42a-43a. On or about February 20, 1997 the city attorney drafted and delivered a memorandum to each city council member

making clear that the only basis for the scheduled revocation action was Petitioner's *refusal to allow entry* for the inspection. The memorandum concludes, "[A]ccordingly, since the Housing Maintenance Code requires that each property be inspected on an annual basis, this proceeding was initiated because Lynde Investments refuses to allow entry for such inspection."

On February 24, 1997, Petitioner's counsel informed the City during an open city council meeting that Petitioner believed the City's procedure for conducting its annual inspections was unconstitutional and in violation of both his, and his tenants constitutional rights. Petitioner asserted that he could not consent on a tenant's behalf to the City's requested entry and that the City's requirement that he grant it access into his tenants' apartment units, absent tenant consent or a search warrant, was an unconstitutional condition on the maintenance of his rental licenses. Petitioner's counsel cited several state, federal, and United States Supreme Court cases to the city council in support of his position and requested that the City review them, and the merits of his position before taking any action to revoke or suspend his rental licenses.[1]

On March 10, 1997 the City revoked Petitioner's rental dwelling licenses. Prior to its revocation action, the City had neither obtained, nor attempted to obtain, either tenant consent or search warrants for its inspections. On March 12, 1997 the City posted each rental property with a "Notice to Vacate within 60 days." The notices simply

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[1] Petitioner cited the following United States Supreme Court cases to the city council on February 24, 1997 in support of his position; Camara v. Municipal Court of the City and County of San Francisco, 87 S. Ct. 1727, 387 U.S. 523, 18 L.Ed.2d 930 (1967)(Either tenant consent or a search warrant is required for governmental search/inspection); and Chapman v. United States, 365 U.S. 610 (1960)(A fundamental rule of law is that one person cannot waive the Constitutional rights of another person).

stated that the licenses were revoked for "failure to allow inspection." Numerous tenants vacated their apartment units in response to the posting.

3. On or about March 14, 1997 Petitioner brought this action in district court alleging, inter alia, constitutional violations including the violation of his substantive due process rights. Petitioner asserted that his rental licenses were revoked for refusing to grant the City *access* into his tenants' apartment units without first obtaining tenant consent or search warrants for its inspections. Certain tenants additionally intervened in the action asserting, inter alia, that both the City *and Petitioner* had violated their due process rights during the inspection process.

In July 1998, the City moved for summary judgment on Petitioner's claims. In its summary judgment motion, the City asserted for the first time that Petitioner's licenses had actually been revoked for failure to give his tenant's *notice* of the inspections and not for failure to allow *access* for the inspections. Petitioner likewise moved for summary judgment asserting that his licenses were actually revoked for failure to allow the City *access* into each tenant's individual unit without tenant consent or search warrant and that his substantive due process rights were thereby violated.

4. On May 3, 1999, the district court granted the City's motion for summary judgment. Pet. App. 22a-38a. In its opinion, the district court states that the material facts *are not* in dispute. *id.* 26a. However, the district court did recognize that the basis upon which the City actually voted to revoke Petitioner's rental licenses was a contested issue with Petitioner claiming *access* and the City claiming *notice*. *id.* 25a.

In its opinion, the district court construed Section 5A.301(1) of the City's Housing Code to mean that the City may notify the property owner of a planned inspection and have the owner notify the tenants

individually thereof. *id.* 32a-33a. The district court concluded that because Petitioner did not notify his tenants of the inspections, the license revocation was not arbitrary, capricious, or unconstitutional. *id.* 28a. The district court's opinion provides no findings as to how, or on what basis, it determined Petitioner's rental licenses were *actually* revoked for failure to notify.

5. Petitioner appealed the district court's summary judgment ruling arguing that his licenses were *in fact* revoked for failure to allow *access* and that revoking his licenses on such basis was an arbitrary and capricious action, and that the revocation violated his substantive due process rights. Petitioner asserted on appeal that the basis upon which his rental licenses were *actually* revoked (access vs. notice) was a contested issue which was *genuine* and *material* to the outcome of the matter and that it was therefore improperly resolved by summary judgment.

On August 8, 2000, a three judge panel for the court of appeals affirmed the district court's summary judgment ruling. Pet. App. 13a-21a. The panel recognized the access vs. notice issue but summarily concluded that it found "no clear error in the district court's finding that the City refused to renew Petitioner's license because he failed to schedule an inspection date and notify his tenants of that date." *id.* 17a-18a. As stated previously, the City's action was actually a license revocation and not a license non-renewal.

6. On January 17, 2001 Petitioner was granted a rehearing en banc by the Eighth Circuit and the panel opinion was vacated. Pet. App. 12a. Petitioner persisted in arguing that the access vs. notice issue had been improperly determined for summary judgment purposes and continued to insist that his substantive due process rights had been violated if his factual assertions were proven at trial.

On October 11, 2001 a six judge majority of the en banc court affirmed the district court's summary judgment ruling and adopted the panel opinion.[2] Pet. App. 1a-11a. The en banc court again recognized the issue of access vs. notice and again summarily determined that the licenses were revoked for failure to give notice. *id.* 6a.

Judge Arnold, with whom Judges Bowman and Bye joined, dissented with the majority opinion. The dissent asserts that Petitioner's substantive due process rights were violated if the contested issue of access vs. notice were determined in Petitioner's favor at trial and that Petitioner had provided at least enough evidence to survive summary judgment. *Id.* 10a-11a.

7. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's opinion conflicts with the numerous decisions of this Court regarding summary judgment including; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)(An issue of material fact exists if, under the substantive law, the disputed fact might affect the outcome of the suit); and, *Matsushita Elec. Industry. v. Zenith Radio*, 475 U.S. 574, 587 (1986)(A court considering a motion for summary judgment must view all facts in the light most favorable to the non-moving party and give to the non-moving party the benefit of all reasonable inferences that can be drawn from the facts). Moreover, the Eighth Circuit's opinion, in effect, supports the action of a municipality which clearly violates the rule of law set forth by this Court in *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967). This Court should therefore exercise its supervisory power to prevent this clear departure from the accepted and usual course of judicial proceedings.

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[2] Judge Murphy who joined in the majority opinion did not take part in the oral argument.

The Eighth Circuit's opinion supports the district court's resolution of a genuine, contested issue of material fact and precludes Petitioner from having the issue properly determined at trial. The issue determined on summary judgment was further essential to determining whether Petitioner's substantive due process rights were violated by the City. While the standard to maintain a valid claim for violation of substantive due process rights is admittedly high, it is not unattainable, and Petitioner should not be precluded from having this critical issue determined at trial.[3] If the standards set forth in the previous decisions of this Court were adhered to, Petitioner would have the opportunity to prove that his licenses were revoked for failure to allow *access* and that a violation of his substantive due process rights had in fact occurred.

An issue of material fact exists if, under the substantive law, the disputed fact "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The issue regarding the basis on which the City *actually* revoked Petitioner's rental licenses *is material* to the outcome of the matter and is contested. Although the district court construed the City Code to require that Petitioner provide notice to his tenants of upcoming City inspections, and the *en banc* opinion "[F]or purposes of summary judgment...assume[d] that the City initially refused renewal of the real estate licenses based on Rozman's failure to notify and obtain the consent of his tenants...", Pet. App. 8a, the record is void of factual evidence supporting this to be the actual basis for the City's revocation action. Further, no Code provision exists to support this construction. Conversely, numerous facts exist in the record which establish that Petitioner's

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[3] As stated previously, the dissenting opinion provides that Petitioner's substantive due process rights were violated if the licenses were revoked for failure to allow access.

rental licenses were actually revoked for failure to allow access and not for refusal to provide notice. See i.e., Pet. App. 42a-43a. If the lower courts' factual assumptions and determinations were not made in favor of the *moving* party, and Petitioner's factual assertions were properly taken as true, summary judgment could not be entered for the City.

In *Camara v. Municipal Court of the City and County of San Francisco*, this Court held that privacy rights regarding governmental entries for administrative searches, like those in the present case, are protected by the Fourth Amendment, and accordingly require either tenant consent or a search warrant to safeguard those guarantees to the individual. In this matter, the City demanded that Petitioner open his tenants' doors and allow it access for its annual inspections without first obtaining tenant consent or search warrants as mandated by the *Camara* ruling.

Further, on February 24, 1997, two weeks before the City voted to revoke his rental licenses, Petitioner provided the City council with citation to numerous state, federal, and United States Supreme Court cases, including *Camara* and *Chapman*, which supported his position that before he could provide the requested access, the City must obtain either tenant consent or search warrants. On March 10, 1997, in the face of this clear legal precedent, the City arbitrarily and irrationally proceeded to revoke Petitioner's rental licenses for refusing to grant the City the unrestricted access it demanded. If it is proven at trial that Petitioner's licenses were actually revoked for refusal to allow the access demanded, such action would violate Petitioner's substantive due process rights as further discussed below. Accordingly, resolution of this issue will certainly affect the outcome of the matter and is therefore a material issue for summary judgment purposes.

Revoking Petitioner's rental licenses for refusal to grant access violates Petitioner's substantive due process rights. In *Littlefield v. City of Afton,* 785 F.2d 596 (8th Cir. 1986), the court found that the plaintiff established a substantive due process claim by establishing that the city acted arbitrarily and capriciously in imposing an unconstitutional condition in granting a building permit. As in *Littlefield*, if it is proven at trial that the City revoked Rozman's rental licenses for failure to allow access, without previously obtaining consent or search warrants, such action would clearly violate the requirement mandated by *Camara* and thereby impose an unconstitutional condition on Petitioner's license retention. Further, in light of Petitioner's previous plea to the City that it simply follow *Camara's* requirements in conducting its searches, the City's revocation action, as in *Littlefield*, should be determined arbitrary and capricious, sufficient to establish Petitioner's substantive due process claim.

The issue regarding the basis on which the City *actually* revoked Petitioner's rental licenses is also *genuine* to the outcome of the matter and is contested. Numerous facts exist in the record which establish that Petitioner's rental licenses were revoked for failure to allow access and not for refusal to provide notice. The record is factually void of evidence supporting the City's assertion that Petitioner's licenses were revoked for refusal to notify his tenants of the inspections. Accordingly, a reasonable fact finder could find that Petitioner's rental licenses were actually revoked for refusing the City access and the access vs. notice issue is therefore *genuine* pursuant to the summary judgment standard set forth by this Court.

Because the actual basis upon which the City revoked Rozman's rental licenses is genuine and material to the outcome of the matter and, because such basis is clearly

contested by the parties, determination of this issue should be made at trial and not on motion for summary judgment. Additionally, because the City demanded that Petitioner open his tenants' doors for its annual inspections without first obtaining tenant consent or search warrants, as mandated by the *Camara* decision pursuant to Fourth Amendment protections, other cities and municipalities across the country may be emboldened to use landlords as their agents to gain similar access into citizens' homes if this ruling is allowed to stand.

Petitioner will prove at trial that his rental licenses were revoked for failure to allow the City *access* into his tenants' homes without consent or a search warrant in violation of the rule set forth by this Court in *Camara*. Petitioner will further prove at trial that the revocation action was based on a City mandate that required him to either commit a crime (trespassing on his tenants' property) or perform an impossible act (giving the City permission which Petitioner has no authority to give).

> It would be difficult to think of something more arbitrary than requiring a person to do the impossible; such a requirement is a quintessential example of the use of governmental power "as an instrument of oppression." *Davidson v. Cannon*, 474 U.S. 344, 348 (1986).

Rozman v. City of Columbia Heights, 2001 WL 1195130 (C.A.8 (Minn.) 2001), Morris Sheppard Arnold dissenting.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 99-2630

Bennie Rozman, doing business as Lynde Investment Company,

Plaintiff/Appellant,

Susan Rodriguez, Sherri Boniarczyk,

Intervenor Plaintiff,

v.

City of Columbia Heights, Joseph Sturdevant, Walt Fehst, Meg Jones, Robert W. Reuttimann, Charles Kewatt, Lowell G. Demars, Matt D. Field, Gary Gorman, Rollin Goldsberry,

Defendants/Appellees.

Appeal from the United States District Court for the District of Minnesota

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Submitted: July 10, 2001
Filed: October 11, 2001

Before WOLLMAN, Chief Judge, BRIGHT, McMILLIAN, BOWMAN, LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD, MURPHY, and BYE, Circuit Judges.

PER CURIAM.

This opinion follows an en banc hearing held on July 10, 2001. Bennie Rozman ("Rozman") appealed the district court's grant of summary judgement to the City of Columbia Heights ("City") denying Rozman's constitutional and other claims made following the City's revocation of his rental licenses for a number of apartment buildings Rozman owned in the City. A panel of this court affirmed the district court in Rozman v. City of Columbia Heights, 220 F.3d 864 (8th Cir. 2000). On January 17, 2001, the court granted Rozman's petition for rehearing en banc and vacated the panel opinion. On rehearing en banc, we affirm the district court.

I. BACKGROUND

The panel opinion stated the underlying facts as follows:

> The City of Columbia Heights requires owners of residential rental property to obtain rental licenses before they may rent their properties to tenants. Rental property owners must then renew these licenses annually....Since the annual inspection requirement has been in effect, City practice has been to schedule a date for rental apartment inspection with the landlord, and require that landlords notify their tenants that the City intends to conduct the inspection. The inspections routinely coincide with the annual renewal of each rental property's rental license.
>
> ....
>
> Rozman complied with the City's annual inspection program until 1996, at which time his concerns about the constitutionality of the program motivated him to refuse to perform the landlord's expected role in the City's inspection program. Rozman informed the City that he

would neither give notice to his tenants of the upcoming inspection, nor would he grant access to any of the rental units without a showing that the City had either the tenant's consent to enter his or her apartment or a search warrant. The City then sent a letter to Rozman threatening to refuse to renew his license.... [T]he [City] Council voted, on March 10, 1997, to revoke Rozman's rental licenses due to his refusal to schedule the required annual inspection of the rental units.

Id. at 865-66

After hearing argument in this matter and considering the briefs, the en banc court affirms the judgment of the district court and adopts the panel opinion. We summarize and amplify the panel opinion.

II. Discussion

A. Rozman's Claims

In the district court, Rozman claimed in count one that the City deprived him of his property interest in his rental licenses without due process of law in violation of 42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments. The district court determined that the City did not act arbitrarily or capriciously when it revoked Rozman's licenses because he refused to notify his tenants of an upcoming inspection. We affirm because the City may constitutionally require landlords to notify their tenants of an upcoming inspection. Also, Rozman's relief under § 1983 fails because the City did not deprive him of any constitutional right, privilege, or immunity. We amplify this determination in our discussion below.

In count two, Rozman claimed that the City violated his Fourth Amendment rights when it entered the tenant's apartments without their permission. We affirm this ruling and agree with the district court that Rozman lacked standing to assert his tenants' rights.

In count three, Rozman claimed that the City violated the Equal Protection Clause of the Fourteenth Amendment and violated 42 U.S.C. § 1985(3) when it revoked his rental licenses without cause. The district court determined that Rozman's Equal Protection claim failed because he did not establish facts sufficient for a disparate treatment claim. We affirm because the district court's interpretation of the Code means that the City had a constitutionally permissible reason to revoke Rozman's licenses-namely, that he refused to notify his tenants of the upcoming inspection.

In counts four through eight, Rozman asserted state law claims. The district court declined to exercise supplemental jurisdiction over these claims. We also decline to assert jurisdiction over Rozman's state law claims inasmuch as his federal claims have been properly dismissed.

Under count nine, Rozman argued that three sections of the City's Code are unconstitutional, both facially and as applied. The district court interpreted the City Code to be constitutional and determined that Rozman had no standing to challenge the other Code sections. First, as to § 5A.606, we agree with the district court that Rozman lacked standing to challenge the provision because it applies to occupants only, not to owners such as Rozman.

Second, regarding City Code § 5A.603, the district court disposed of Rozman's claim by interpreting the provision so that it met constitutional muster. In particular, the district court determined that no person may refuse to consent to an inspection when the inspector has a valid search warrant. We affirm because the City may constitutionally require landlords to notify their tenants of an upcoming inspection. As to § 5A.301, we agree with the district court that Rozman lacked standing to claim that the notice requirement violated the tenants' rights because he cannot assert the rights of his tenants.

B. Rehearing Argument

Oral argument focused on (1) the City's reason for revoking Rozman's licenses; (2) his substantive due process claim; and (3) whether Rozman was obligated to attempt to obtain his tenants' consent. Rozman claimed that his refusal to afford the City access to his tenants' apartments constituted the basis for the non-renewal of the licenses. Additionally, Rozman argued that he had no right to grant access to individual tenant's apartments because consent belonged to the individual tenants. The City's resolution stated the reasons for the non-renewal of the licenses as:

> 2. That as of FEBRUARY 12, 1997, LYNDE INVESTMENTS has refused to schedule the required annual inspection of the rental units.
>
> 3. Based upon said information presented by the Enforcement Officer, the following conditions and violations of the City's Housing Maintenance Code and

> Licensing Rental Units were found to exist, to-wit:
>
> A. FAILURE TO ALLOW ANNUAL INSPECTION OF ALL RENTAL UNITS LOCATED AT...

App. Of Appellant at 36.

Regardless of the conflicting factual claim surrounding the events preceding the revocation of the licenses, there is no dispute that Rozman refused to schedule the inspections. As we said in the panel opinion, the City may constitutionally require the landlord to notify tenants of the City inspection. Rozman, 220 F.3d at 868. Because this requirement is not an irrational act, Chesterfield Dev. Corp. v. City of Chesterfield, 963 F.2d 1102, 1104-1105 (8th Cir. 1992), we determine the requirement does not violate substantive due process.

During oral argument, counsel for the City emphasized that there are two requirements for an annual inspection. First, the landlord must notify the tenants of the inspection. Second, the landlord must obtain consent from the tenants to conduct the inspection.

On the other hand, Rozman argued that notification and obtaining consent to inspect amounts to a single requirement of obtaining the tenants' consent. He maintained that constitutionally he cannot be forced or required to obtain those consents.

The district court did not approve of the City's assertion regarding the tenants' consent. The district court did not specifically address the question of whether Rozman, in scheduling inspections, needs to obtain, or at

least ascertain, whether the tenants consent to the inspection. As the district court stated: "Plaintiff admits that it refused to provide notice to its tenants of upcoming maintenance inspections, as the Code requires. Plaintiff's failure to comply with the Code's requirements justified the revocation of its licenses, and the City's actions in revoking the licenses were not arbitrary and capricious." Add. at 6. Thus, the district court relied on the failure to give notice as a violation of the ordinance without ruling on the matter of consent.

In its construction of the ordinance, the district court further stated:

> Although it is difficult to discern, plaintiff also seems to be arguing that the notice requirement is unconstitutional because it makes the landlord liable for the tenants' exercise of their constitutional right to refuse consent. Section 5A.301 requires the landlord to give notice of an impending inspection to its tenants, and according to plaintiff also in effect requires the landlord to consent to the inspections in place of the tenants. If a tenant, after receiving notice, refuses to give his or her consent to the inspection, the landlord may be in violation of § 5A.603 if the landlord subsequently refuses to allow entry into the tenant's apartment. However, as explained above with respect to plaintiff's challenge to § 5A.603, the landlord cannot violate § 5A.603 unless he refuses to provide access to inspectors in the face of a valid search warrant. Such a requirement complies with Camara [v. Municipal Court of the City and County of San Francisco, 387 U. S. 523, 87 S. Ct. 1727, 18 L. Ed.2d 930 (1967)] and is constitutional.

Add. at 11.

For Purposes of summary judgement, we will assume that the City initially refused renewal of the real estate licenses based on Rozman's failure to notify and obtain the consent of his tenants, at least where the tenants were amenable to inspection upon request. The City's Code does not specifically address this notification/consent requirement. See § 5A.301(1).[1] As we have observed, the district court construed the ordinance as requiring a valid search warrant to enter the tenants' apartments without consent.

However, the City's requirement that the owner obtain consent from the tenants for an inspection represents the City's construction of the ordinance. That construction may or may not be correct and as previously stated, the district court did not decide this issue. We need not resolve that construction to decide this case. A misreading of an ordinance and its consequent violation

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[1] City Code § 5A.301 (1) provides in its entirety:

The City Manager and his/her designated agents, as the Building Official who shall administer and enforce the provisions of this ordinance, may enter for the purpose of inspection, any rental dwelling (whether it be standing alone or as a unit in a larger complex or units), or premises, upon twenty-four (24) hours notice to the owner, occupant, manager, or person in charge of the rental dwelling or premises. Inspection shall be conducted during reasonable [sic] hours, and upon request the Building Official shall present evidence of his/her official capacity to the owner, occupant or person in charge of a dwelling unit sought to be inspected. With regard to owned occupied single family dwelling units, the Building Official shall have the authority to enter onto the premises, during reasonable hours, for inspection of the exterior of the building.

Add. at 19.

of state law do not give rise to an action for violation of substantive due process. Bituminous Materials, Inc. v. Rice County, Minn., 126 F.3d 1068. 1070 (8th Cir. 1997); Chesterfield Dev. Corp., 963 F.2d at 1105; Myers v. Scott County, 868 F.2d 1017, 1018 (8th Cir. 1989). In sum, misinterpretation or misapplication of the City Code does not give rise to a federal substantive due process claim.

Moreover, even if the ordinance required the owner in scheduling the inspection to obtain the consent of willing tenants, we cannot say such requirement necessarily offends the Due Process Clause. Rozman has cited no authority to make out a substantive due process violation, i.e., by showing that a governmental power was exercised arbitrarily and oppressively. See County of Sacramento v. Lewis, 523 U. S. 833, 845-46 (1998). The government action must be arbitrary in the constitutional sense. Collins v. City of Harker Heights, Tex., 503 U. S. 115, 129 (1992).

We have said that "the theory of substantive due process is properly reserved for truly egregious and extraordinary cases." Chesterfield Dev. Corp., 963 F. 2d at 1105 (quoting Myers, 868 F.2d at 1019). Here, the construction of the City ordinance does not clearly establish any constitutional violation, even assuming that such construction of the Code by the City is correct.

While the action of the City towards Rozman in revoking his real estate licenses in 1997 may not have complied with the provisions of the law as it may ultimately be interpreted, that action certainly did not rise to the level of a constitutional violation of substantive due process.

We express no opinion as to whether under state law the ordinance in question can require Rozman to obtain his tenants' consent to inspection. Such issue and its possible constitutional ramifications are for the state courts to interpret in the first instance.

III. CONCLUSION

The district court's granting of summary judgment is affirmed. No costs are awarded on appeal.

MORRIS SHEPPARD ARNOLD, Circuit Judge, with whom BOWMAN and BYE, Circuit Judges, join, dissenting.

I respectfully suggest that the court has incorrectly described Mr. Rozman's substantive due process claim. Mr. Rozman claimed that his substantive due process rights were violated when the City revoked his license for refusing to allow the City to enter his tenants' units to inspect them. On summary judgment, the district court found that the City revoked Mr. Rozman's license because he failed to notify his tenants of an upcoming inspection, and a panel of our court approved that holding. *See Rozman v. City of Columbia Heights*, 220 F.3d 864 (8th Cir. 2000).

In the first place, the City directs our attention to no provision of the housing code that requires landlords to notify tenants of inspections. But the main difficulty that I see here is that the City itself stated that it revoked Mr. Rozman's license for a "failure to allow annual inspection," which clearly implies that the City believed that Mr. Rozman had some affirmative duty to give inspectors access to his tenants' apartments. As Mr. Rozman correctly points out, this requires him to do

something that he cannot legally do because he has no right to possession of the relevant units. That right belongs to the tenants because they own a leasehold in those premises.

In my opinion, therefore, Mr. Rozman has at the very least produced enough evidence to survive summary judgement on the question of what the City's motive was for revoking his license. Furthermore, if the City's motive for revoking the license was what Mr. Rozman says it was, I think that his substantive due process rights were violated because the City has conditioned a license on a landlord's commission of a tort or crime (trespassing on a tenant's property) or on the commission of an impossible act (giving permission that the landlord has no power to give). It would be difficult to think of something more arbitrary than requiring a person to do the impossible; such a requirement is a quintessential example of the use of governmental power "as an instrument of oppression." *Davidson v. Cannon*, 474 U. S. 344, 348 (1986).

I therefore respectfully dissent.

A true copy.

Attest:

CLERK, U. S. COURT OF
APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-2630

Bennie Rozman, doing business as
Lynde Investment Company,

Appellant,

v.

City of Columbia Heights, Joseph Sturdevant, Walt Fehst, Meg Jones, Robert W. Reuttimann, Charles Kewatt, Lowell G. Demars, Matt D. Field, Gary Gorman, Rollin Goldsberry,

Appellees.

Appeal from the United States District Court for the District of Minnesota

Appellant's petition for rehearing en banc has been considered by the Court and is granted. The opinion and judgment of this court filed on August 8, 2000, are vacated.

En banc argument will be held in St. Louis, Missouri on July 10, 2001. The time of the argument will be set at a later date. (5369-01!0199)

January 17, 2001

Order Entered at the Direction of the Court

Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 99-2630

Bennie Rozman, doing business as Lynde Investment Company,

Plaintiff/Appellant,

Susan Rodriguez, Sherri Boniarczyk,

Intervenor Plaintiff,

v.

City of Columbia Heights, Joseph Sturdevant, Walt Fehst, Meg Jones, Robert W. Reuttimann, Charles Kewatt, Lowell G. Demars, Matt D. Field, Gary Gorman, Rollin Goldsberry,

Defendants/Appellees.

Appeal from the United States District Court for the District of Minnesota

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Submitted: May 12, 2000
Filed: August 8, 2000

Before McMILLIAN, BRIGHT, and WOOD[1], Circuit Judges.

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[1] The Honorable Harlington Wood, Jr., United States Circuit Judge for the Seventh Circuit, sitting by designation.

BRIGHT, Circuit Judge.

Bennie Rozman ("Rozman"), d/b/a Lynde Investment Company, appeals the district court's grant of summary judgment to the City of Columbia Heights ("City"). Rozman sued the City in district court for allegedly violating his Fifth and Fourteenth Amendment rights under 42 U. S. C.§ 1983, violating his Fourth Amendment rights, and violating his constitutional right to equal protection under 42 U.S.C. § 1985 (3). Rozman also sought a preliminary injunction preventing the City from revoking Rozman's rental licenses. The court rejected Rozman's numerous constitutional claims and denied his motion for a preliminary injunction against the City. Rozman further asked the district court to exert supplemental jurisdiction over his pendent state law claims, but the court dismissed them without prejudice upon granting summary judgment to the City on Rozman's federal claims.

Rozman now asks this court to reverse the district court's grant of summary judgment on his substantive due process claim under § 1983, and he requests that this court direct the district court to exercise supplemental jurisdiction over his state law claims. We reject these requests and affirm.

I. Background

The City of Columbia Heights requires owners of residential rental property to obtain rental licenses before they may rent their properties to tenants. Rental property owners must then renew these licenses annually. Since 1994, the City's Housing Maintenance Code ("City Code"), under § 5A.303 (1), has required the City to

inspect rental housing annually. Since the annual inspection requirement has been in effect, City practice has been to schedule a date for rental apartment inspection with the landlord, and require that landlords notify their tenants that the City intends to conduct the inspection. The inspections routinely coincide with the annual renewal of each rental property's rental license.

The City Code empowers City inspectors to conduct the annual inspection on twenty-four hours notice "to the owner, occupant, manager, or person in charge" of the dwelling. Section 5A.301(1).[2] Under §§ 5A.603 and 5A.608, the owner or occupant may not refuse to allow the inspector to enter the premises. The City Code further states that violation of any provision of the Code is a misdemeanor. See § 5A.611. Finally, § 5A.302 of the Code explains that the City may obtain search warrants for the inspections if the owner or occupant refuses to provide access to the dwelling.

At the time he initiated this lawsuit, Rozman owned and managed twelve residential rental properties in Columbia Heights, Minnesota. Rozman complied with

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[2] City Code § 5A.301(1) provides in its entirety:
The City Manager and his/her designated agents, as the Building Official who shall administer and enforce the provisions of this ordinance, may enter for the purpose of inspection, any rental dwelling (whether it be standing alone or as a unit in a larger complex or units), or premises, upon twenty-four (24) hours notice to the owner, occupant, manager, or person in charge of the rental dwelling premises. Inspection shall be conducted during reasonable [sic] hours, and upon request the Building Official shall present evidence of his/her official capacity to the owner, occupant or person in charge of a dwelling unit sought to be inspected. With regard to owned occupied single family dwelling units, the Building official shall have the authority to enter onto the premises, during reasonable hours, for inspection of the exterior of the building.
Add. at 19.

the City's annual inspection program until 1996, at which time his concerns about the constitutionality of the program motivated him to refuse to perform the landlord's expected role in the City's inspection program. Rozman informed the City that he would neither give notice to his tenants of the upcoming inspection, nor would he grant access to any of the rental units without a showing that the City had either the tenant's consent to enter his or her apartment or a search warrant. The City then sent a letter to Rozman threatening to refuse to renew his license. After a series of negotiations, a public meeting, and a "workshop" meeting between Rozman and the City Council, the Council voted, on March 10, 1997, to revoke Rozman's rental licenses due to his refusal to schedule the required annual inspection of the rental units. At no time during its interactions with Rozman did the City seek or obtain a search warrant for entry into any of the units that he managed.

After the City refused to renew his rental license, Rozman brought this action in district court alleging numerous constitutional violations, alleging state law violations, and praying for damages under § 1983 as well as injunctive relief. The district court granted summary judgment to the City on all federal claims, denied the injunction, and dismissed Rozman's state claims without prejudice. In its summary judgment order, the district court construed the pertinent sections of the City Code in a manner that would clarify certain issues and preserve the ordinances' constitutionality. Specifically, the court interpreted the City Code provision regarding notice, § 5A.301(1), to mean that the City may notify the property owner of a planned inspection and have the owner notify the tenants individually. In addition, the district court interpreted §§ 5A.603 and 5A.608, regarding access to the premises, to incorporate the caveat that, absent an

occupant's consent to enter and search the premises, the City must present a valid search warrant before these provisions take effect.

II. Discussion

On appeal, Rozman pursues his substantive due process claim against the City. Rozman argues that, to the extent that the City Code empowers the City to violate his tenant's Fourth Amendment rights, it is unconstitutional; therefore, conditioning his license renewal on compliance with an unconstitutional statute is arbitrary and capricious. He further argues that, unless the City obtains his tenants' consent or secures and administrative search warrant, it is an unconstitutional condition to require that he assist the City in violating his tenants' Fourth Amendment rights before he can obtain a license renewal.[3] Underlying Rozman's argument is the presumption that the City has refused to renew his license because he would not provide the City with access to the rental units unless the City could show that it had obtained tenant consent to enter or a valid search warrant. Conversely, the City has argued that it only requires landlords to notify tenants of the inspection before renewing the license. As the district court aptly notes, "The City claims that the 'failure' described in the revocation was failure to give notice to tenants of the

[3] Rozman also raises for the first time on appeal, the argument that the City revoked Rozman's rental licenses in retaliation for exercising his constitutionally protected rights. As a general rule, this court does not review arguments raised for the first time on appeal, see Central Airlines, Inc. v. United States, 169 F.3d 1174, 1175 (8th Cir. 1999), nor will we do so here. Rozman presents cases in the Fifth Circuit that create an exception to this general rule when doing so would avoid manifest injustice. See, e.g., Higginbotham v. Ford Motor Co., 540 F.2d 62, 768 n. 10 (5th Cir. 1976). Even if we adopted such and exception, it would not apply to the circumstances in this case.

upcoming inspection. Plaintiff [Rozman] claims that the 'failure' was instead failure to give the inspectors access to individual apartments without the permission of the occupant." Add. at 4. We find no clear error in the district court's finding that the City refused to renew Rozman's license because he failed to schedule an inspection date and notify his tenants of that date.[4]

In a § 1983 suit against a municipality, we must determine two separate issues: "(1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation." Collins v. City of Harker Heights, 503 U.S. 115,120, (1992). Here, the City takes responsibility for its actions, and the relevant facts relating to the City's actions against Rozman are largely undisputed.[5] Therefore, the central question is whether the City's actions violated any constitutional provision. Under the district court's construction of the City Code, with which we agree, we now hold that the City did not violate Rozman's constitutional rights.

The district court held that the City Code requires a landlord to grant the City inspectors access to tenant's apartments after the tenants have received notice of the proposed inspection and have consented to such

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[4] We do note, however, that the City suggests in its brief that if was Rozman's duty to obtain permission from the tenants for the City to enter their apartments. The district court's interpretation of the City Code does not support the City's implication, nor do we think the record supports this argument. Nevertheless, the district court did not find that Rozman's failure to obtain tenant consent was the basis for the City's refusal to renew Rozman's license, and we find no clear error in the district court's determination.

[5] To the extent that the parties dispute pertinent facts, we see no clear error in the district court's factual findings, and so we defer to the district court's recitation of the relevant facts in this case.

inspections, or after the City has obtained a valid search warrant.[6] Under Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967), the district court's construction of the City Code is the necessary construction. See Frisby v. Schultz, 487 U. S. 474, 483 (1988) (statutes will be interpreted to avoid constitutional difficulties). Camara subjects routine administrative searches of the home to Fourth Amendment scrutiny, and it requires that they occur only after consent or pursuant to a valid search warrant. 387 U. S. at 539. Therefore, the City Code, specifically §5A.603, cannot require anyone to grant the City access to a dwelling for routine inspection unless the resident has consented or the City has obtained a valid search warrant for the premises.

The City terminated Rozman's rental licenses for his "failure to allow inspection of the rental units." The City may constitutionally require the landlord to notify tenants of the City inspection. Such a requirement is not so fundamentally unfair that it rises to the level of a substantive due process violation. See Chesterfield Dev. Corp. v. City of Chesterfield, 963 F.2d 1102, 1104-1105 (8th Cir. 1992)(government action must be irrational in order to violate substantive due process). Furthermore, providing notice to a tenant does not violate either the landlord's or the tenant's constitutional rights.

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[6] The district court stated, "If a tenant, after receiving notice, refuses to give his or her consent to the inspection, the landlord may be in violation of § 5A.603 if the landlord subsequently refuses to allow entry into that tenant's apartment...in the face of a valid search warrant." Add. at 11. The district court did not make explicit that a tenant's silence after receiving notice is not consent to the search under the Fourth Amendment. There must be some evidence of a tenant's affirmative consent before the landlord is required to allow the City access to the apartment in the absence of a valid search warrant.

To the extent that Rozman requests this court to construe state and municipal statues for non-constitutional reasons, we decline to do so and leave that matter to the state courts. We do note, however, that the City Code, as currently written, is not reasonably susceptible to a reading that requires landlords to obtain tenants' consent to the administrative search. Under the Fourth Amendment, in the absence of a search warrant, a tenant must give consent before the City's agents may lawfully enter the tenant's residence. Tenant consent to the search may be express or implied,[7] but it is clear that the City's agents must be able to show that "consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." Bumper v. State of N.C., 391 U. S. 543, 548-49 (1968)(footnote omitted).

Given the facts as found by the district court, we find no constitutional violation in requiring a landlord to provide notice to his tenants of proposed City inspections for purposes of enforcing the City Code. Because we affirm the district court's dismissal of Rozman's federal claims, we decline to require the district court to reassert jurisdiction over Rozman's state law claims.

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[7] There is some suggestion in the case law that consent may be implied from the totality of the circumstances, see, e.g., United States v. Martel-Martines, 988 F.2d 855, 858 (8th Cir. 1993)(failure to object allowed inference of implied consent) and Johnson v. Smith County, Tex., 834 F.2d 479, 480 (5th Cir. 1987)(failure to object allowed inference of implied consent); nevertheless, in the absence of a warrant, the government must be able to show that it searched pursuant to voluntarily given consent.

III. Conclusion

For the reasons stated above, we affirm the district court's dismissal on summary judgment. Each party shall pay its own costs.

A true copy.

Attest:

CLERK, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Bennie Rozman d/b/a Lynde Investment Company,

Plaintiff,

and

0:97-CV-604

Susan Rodriguez and Sherri Boniarczyk,

Intervenors,

v.

MEMORANDUM OPINION AND ORDER

City of Columbia Heights, Joseph Sturdevant, Walt Fehst, Meg Jones, Robert W. Reuttimann, Charles Kewatt, Lowell G. Demars, Matt D. Field, Gary Gorman, Rollin Goldsberry,

Defendants.

John W. Tackett, Tackett Law Office, Suite 320, 1422 West Lake Street, Minneapolis, MN 55408, and Michael A. Rozman, Rozman Law Office, Suite 320, 1425 Hampshire Avenue South, St. Louis Park, MN 55426, for Bennie Rozman d/b/a Lynde Investment Company.

Floyd A. Pnewski, III and Shelley D. Jensen, Judicare of Anoka County Inc., Suite 310, 1201 89th Avenue Northeast, Blaine, MN 55434, for Susan Rodriguez and Sherri Boniarczk.

Stephen C. Rathke, Lommen, Nelson, Cole & Stageberg, 1800 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402, for City of Columbia Heights, Joseph Sturdevant, Walt Fehst, Meg Jones, Robert W. Reuttimann, Charles Kewatt, Lowell G. Demars, Matt D. Field, Gary Gorman, and Rollin Goldsberry.

This matter is before the Court on plaintiff's motion for preliminary injunction, plaintiff's motion for summary judgment, defendants' motion for summary judgment, and intervenor's motion for summary judgment.

BACKGROUND

The plaintiff in this case is Bennie Rozman, doing business as Lynde Investment Company ("Lynde"). Lynde owns 12 apartment buildings in the defendant City of Columbia Heights (the "City"). The individual named defendants include the Mayor of Columbia Heights, two members of the City Council, the City Manager, the City's fire chief and two firefighters, and a Columbia Heights police officer. In this lawsuit, plaintiff challenges the constitutionality of several provisions of the City's Housing Maintenance Code (the "Code"), and argues that the City's enforcement of that Code and the subsequent revocation of plaintiff's rental licenses for violations of the Code infringe on his constitutional rights. In addition, plaintiff's Amended Complaint alleges several state-law tort claims.

Shortly after this lawsuit was filed, two of plaintiff's tenants, Sherri Boniarczyk and Susan Rodriquez (the "intervenors"), sought and were granted intervention as of right. Intervenors' Complaint alleges that both the City

and plaintiff violated intervenors' constitutional rights and that certain provisions of the Code are unconstitutional. Intervenors also assert a state-law tort claim against plaintiff.

Now before the Court are plaintiff's motion for summary judgment against defendants and defendants' cross-motion against plaintiff, intervenors' motion for summary judgment against defendants and the defendants' cross-motion against intervenors, and plaintiff's motion for a preliminary injunction. Complicating the picture is another lawsuit, brought by still more tenants of plaintiff, filed nearly a year after the instant suit was filed and raising many of the same constitutional issues as plaintiff and intervenors raise here. See Armstrong v. City of Columbia Heights, No. 98-CV-527. In that suit, plaintiff here is a defendant and also a cross-claimant against the other defendants, including the City and various City officials, many of whom are also defendants here.

FACTS

In 1994, the City amended its Housing Maintenance Code to provide for the annual inspection of rental dwellings in the City. See Defendants' Appendix (hereinafter "Def. App.") Ex. B at § 5A. 303 (1). The Code allows City inspectors to enter the rental dwelling on twenty-four hours' notice "to the owner, occupant, manager, or person in charge" of the dwelling. Id. § 5A. 301 (1). City practice is to notify the property owner and ask that the owner notify the tenants. See Defendants' Memorandum in Support of the Motion for Summary Judgment at 5. The owner or occupant may not refuse to allow the inspector to enter the premises, see Def. App. Ex. B at §§ 5A. 603, 5A. 608, and violation of any provision of the Code is a misdemeanor. Id. § 5A.611. The City may obtain search warrants for the inspections if

the owner or occupant refuses to provide access to the dwelling. Id. § 5A.302(1). At all times relevant to the Complaints in issue, the City did not seek or obtain warrants for the inspections of plaintiff's properties.

It appears that the dispute between plaintiff and the City has been ongoing since at least 1995. In 1995, plaintiff initially refused to provide access into individual apartments to inspectors, but eventually did so. The City revoked plaintiff's rental licenses, though it is not clear whether this revocation was because of plaintiff's failure to allow inspectors the access they sought or because of Code violations discovered by the inspectors and not corrected by plaintiff. In any event, plaintiff appealed the revocation and the licenses were reinstated.

The current dispute began in May of 1996, when the City again gave notice to plaintiff of its intent to inspect plaintiff's buildings. The City asked plaintiff to notify its tenants of the inspections. Plaintiff refused to notify its tenants, claiming that such notification was the City's responsibility, and likewise refused to open individual apartments without the permission of the occupant. In February of 1997, the City advised plaintiff that it would once again seek to revoke his rental licenses for "failure to allow inspection of rental units." The City claims that the "failure" described in the revocation was failure to give notice to tenants of the upcoming inspection. Plaintiff claims that the "failure" was instead failure to give the inspectors access to individual apartments without the permission of the occupant.

The City Council considered the revocation at a public meeting on February 24, 1997, and again at a "workshop" meeting on March 4, 1997. Plaintiff and its attorney appeared at both meetings and presented its case to the Council. On March 10, 1997, the Council voted to revoke plaintiff's rental licenses. Two days after the revocation, the City posted all apartments owned by

plaintiff with a Notice to Vacate for lack of rental license. Plaintiff filed this lawsuit on March 14, 1997, and the Court ordered the City to remove the Notices to Vacate, which it did on March 25, 1997. On or about March 20, 1997, the City attempted to inspect the buildings owned by plaintiff, sending two firefighters into each of plaintiff's apartment buildings to knock on doors and request permission to enter individual apartments to perform inspections. On March 21, 1997, plaintiff amended its Complaint to include claims arising from the March 20 inspections. On July 28, 1997, the City reinstated plaintiff's rental licenses.

DISCUSSION

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c). In considering a summary judgment motion, a court must determine whether "there are any genuine factual issues that properly can be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U. S. 242. 250 (1986). The parties do not agree on all the relevant facts, but the material facts are not in dispute. Thus, this case is appropriate for summary disposition.

I. PLAINTIFF'S CLAIMS

A. Federal claims

1. *Count I*

In this Count, plaintiff claims that the City deprived it of its property interest in its rental licenses without due process of law, in violation of 42 U.S.C. § 1983 and 5th and 14th Amendments to the United States Constitution. This violation ostensibly occurred when the

City failed to justify the revocation of plaintiff's rental licenses and disregarded the legal authority plaintiff presented to the City Council. This legal authority, according to plaintiff, established the constitutional invalidity of the ordinance requiring the inspections. In its papers in support of plaintiff's motion for summary judgment and in opposition to defendants' motion for summary judgment, plaintiff characterizes this claim as a substantive, rather than a procedural, due process claim.

Defendants are entitled to summary judgment on plaintiff's substantive due process claim. To prove a violation of substantive due process, plaintiff must first establish that he was deprived of a liberty or property interest. See Board of Regents v. Roth, 408 U. S. 564, 569 (1972). Assuming for the purposes of plaintiff's motion that its rental licenses are property interests protected by the Due Process Clause, plaintiff must then establish that the City's actions in revoking the licenses were not rationally related to a legitimate government interest. See Chesterfield Dev. Corp. v. City of Chesterfield, 963 F.2d 1102 (8th Cir. 1992). In essence, the City fails to meet the rational relationship test if its actions were arbitrary or capricious, although there is authority for the proposition that the City's actions must be truly egregious to amount to a violation of substantive due process. See Myers v. Scott County, 868 F.2d 1017, 1019 (8th Cir. 1989)("the theory of substantive due process is properly reserved for truly egregious and extraordinary cases...").

Plaintiff can point to no action by defendants that was in any way arbitrary and capricious, much less "truly egregious." Plaintiff attempts to persuade the Court that defendants were "out to get him" by citing statements allegedly made by various individual defendants. These statements, even read in the light most favorable to plaintiff's position, do not establish any animus on the

part of defendants. In any event, even if plaintiff could establish animus, the City Council had ample authority within the City's building Code to revoke plaintiff's rental licenses. An allegation of animus in and of itself does not support a substantive due process claim. See Bituminous Materials, Inc. v. Rice County, 126 F.3d 1068, 1070 (8th Cir. 1997). Plaintiff admits that it refused to provide notice to its tenants of upcoming maintenance inspections, as the Code requires. Plaintiff's failure to comply with the Code's requirements justified the revocation of its licenses, and the City's actions in revoking the licenses were not arbitrary and capricious.

2. *Count 2*

Count 2 of plaintiff's Amended Complaint alleges that City violated the 4th Amendment rights of plaintiff's tenants when it entered apartments without the consent of the occupant. Plaintiff further alleges that its own 4th Amendment rights were somehow violated when the City revoked its rental licenses for its refusal to allow the City to inspect its rental units. Plaintiff does not explain how the license revocation violated its right to be free from unreasonable searches and seizures. The Court dismisses this portion of the Count.

Plaintiff does not have standing to raise the constitutional rights of its tenants. Plaintiff repeatedly insists that it does not have standing to waive the 4th Amendment rights of its tenants, but does not seem to understand the corollary of this argument: plaintiff likewise cannot vindicate a violation of its tenants' rights. The 4th Amendment rights of the tenants must be raised by the tenants themselves, which is presumably why two tenants were allowed to intervene in the action. Defendants' motion is granted to this Count.

3. *Count 3*

Count 3 claims that defendants "conspired to deprive Plaintiff of equal protection of the laws...in that they purposefully and intentionally singled out Plaintiff for prosecution, treating Plaintiff differently than other property owners, [and] revoking his rental licenses without just cause..." Amended Complaint ¶58. Plaintiff claims that this alleged conspiracy to deprive him of his constitutional rights violated 42 U. S. C. § 1985(3).

Plaintiff has not established a violation of the Equal Protection Clause, and therefore there was no violation of § 1985. The Equal Protection Clause is violated by the disparate treatment of a suspect class from those similarly situated, which treatment results in the deprivation of a fundamental right. Fundamental rights, for the purposes of the Clause, include all First Amendment rights, voting, interstate travel, and privacy. See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 n.3 (1976).

Plaintiff alleges that it is being treated differently than other similarly situated landlords in the City of Columbia Heights. Plaintiff has failed to establish that it is similarly situated to other landlords in the City, and even more damaging to its case, it has failed to establish that it was in fact treated differently than other landlords. Moreover, it is axiomatic that there is no fundamental right to hold and maintain a rental license in the City of Columbia Heights. Because plaintiff has not come forward with even the bare minimum of facts to establish disparate treatment or the violation of a fundamental right, its Equal Protection claims fail.

4. *Count 9*

The final Count of plaintiff's Complaint alleges that three sections of the Code are unconstitutional both facially and as enforced, and seeks a declaratory judgment to that effect. The Court will address each challenge in turn.

a. Section 5A.606

Section 5A.606 provides that no occupant of a rental dwelling shall cause the dwelling to become in violation of the maintenance standards in the Code. See Def. App. Ex. B. Plaintiff has no standing to challenge the constitutionality of § 5A.606. That section applies only to occupants of rental dwellings. Moreover, it is not clear from any of plaintiff's papers why it believes that this section is unconstitutional. Plaintiff's challenge to this section is dismissed.

b. Section 5A.603

Section 5A.603 provides that "no person, firm, corporation, or licensee shall refuse or fail to allow" the inspections. Def. App. Ex. B. Plaintiff contends that the rule of Camara v. Municipal Court, 387 U. S. 523 (1967), makes this section unconstitutional (presumably in combination with § 5A.611, which provides that a violation of the Code is a misdemeanor) because the two sections prescribe criminal sanctions for failure to consent to an inspection.[1] Criminal sanctions, according to plaintiff, may be imposed only for failure to allow an inspection in the face of a valid search warrant. See Camara, 387 U. S. at 532. The Court notes that neither

[1] Intervenors' Memorandum in support of the Motion for Summary Judgment also raises this claim, though their Complaint does not mention a challenge to either of these sections of the Code.

plaintiff nor any of its tenants have been charged with a misdemeanor for failure to allow an inspection.

Defendants contend that the challenged Code section must be read in conjunction with § 5A.302(1), which provides that the City may obtain search warrants to conduct the annual maintenance inspections. According to defendants, this section changes the meaning of § 5A.603. The implicit meaning of § 5A.603 when read in conjunction with § 5A.302(1) is that no person may refuse consent to an inspection when the inspector has a valid search warrant.[2]

It is a well-settled canon of statutory construction that if an ordinance or statute is "fairly subject to a variety of interpretations all but one of which would make it unconstitutional, then the courts must presume [the legislative body] intended the interpretation which is constitutionally permissible." United States v. Thompson, 452 F.2d 1333, 1337 (D. C. Cir. 1971). The interpretation advanced by defendants' saves the constitutionality of § 5A/603. And defendants' motion will be granted as to this section. It should be noted, however, that, in the absence of the implicit warrant requirement, the challenged section appears to be unconstitutional under the rule announced in Camara. The City would be well advised to amend this section to more explicitly include the warrant requirement, and thus avoid the appearance of unconstitutionality.

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[2] Plaintiff Rozman brought a challenge to the City's procedure for obtaining search warrants for the inspection of rental dwellings in Minnesota State court. In November of 1998, the Minnesota Court of Appeals upheld the City's warrant procedure, and the Supreme Court denied review of the case. In re Search Warrant of Columbia Heights, 586 N. W.2d 273 (Minn. Ct. App. 1998), review denied, Jan. 21, 1999.

c. Section 5A.301

Section 5A.301 gives the City the power to inspect rental dwellings on 24 hours' notice to the "owner, occupant, manager, or person in charge of the dwelling or premises..." Def. App. Ex. B. Plaintiff Rozman testified at his deposition that he had no objection to the notice requirement of § 5A.301 as applied to the only portion of the apartment buildings in which plaintiff has a protectable privacy interest: the hallways, laundry rooms, and other common areas. See id. Ex. C at 41, 251-53. Instead, plaintiff alleges that the § 5A.301's notice requirement violates the Constitution because it requires plaintiff to open tenants' doors even if those tenants have not consented to the inspection, and does not require the City to obtain the consent of the tenants prior to conducting the inspection.[3] In other words, plaintiff claims that the notice requirement of § 5A.301 violates its *tenants'* constitutional rights. As explained above, plaintiff has no standing to vindicate the rights of its tenants.

Although it is difficult to discern, plaintiff also seems to be arguing that the notice requirement is unconstitutional because it makes the landlord liable for the tenants' exercise of their constitutional right to refuse consent. Section 5A.301 requires the landlord to give notice of an impending inspection to its tenants, and according to plaintiff also in effect requires the landlord to consent to the inspections in place of the tenants. If a tenant, after receiving notice, refuses to give his or her consent to the inspection, the landlord may be in violation

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[3] As noted in Armstrong v. City of Columbia Heights, No, 98-CV-527, the Court finds curious the City's refusal to give notice of upcoming inspections directly to tenants. The City gave Lynde's tenants notice of the July 1997 inspections, and presumably this notice did not impose an undue burden or expense to the City.

of § 5A.603 if the landlord subsequently refuses to allow entry into that tenant's apartment. However, as explained above with respect to plaintiff's challenge to § 5A.603, the landlord cannot violate § 5A.603 unless he refuses to provide access to inspectors in the face of a valid search warrant. Such a requirement complies with Camara and is constitutional.

B. State claims

Counts 4 through 8 of plaintiff's Amended Complaint allege that some or all of the City defendants committed the state-law torts of libel and slander, interference with business relations, selective and malicious prosecution, and trespass. Because the Court has granted summary judgment to defendants on all of plaintiff's federal claims, the Court must determine whether the exercises if supplemental jurisdiction over these state claims is proper. 28 U.S.C. § 1367(c)(3) provides that the Court "may decline to exercise supplemental jurisdiction over a claim...if the [Court] has dismissed all claims over which it has original jurisdiction." In making this decision, the Court should consider the principles of judicial economy, comity, fairness, and convenience. See Carnegie-Mellon Univ. v. Cohill, 484 U. S. 343, 350 (1988). The Court should also recognize that the "normal practice" when federal claims are dismissed prior to trial is to dismiss the supplemental state claims as well. See Kapaun v. Dziedzic, 674 F. 2d 737, 739 (8th Cir. 1982).

Where, as here, resolution of the remaining claims depends solely on a determination of state law, the Court should decline to exercise jurisdiction. See, e.g., Baggett v. First Nat'l Bank, 117 F.3d 1342, 1353 (11th Cir. 1997)("State courts, not federal courts, should be the final arbiters of state law."). Likewise, the litigation is not so

far along that dismissal of these claims will work a hardship on any party. See Willman, 34 F.3d at 613 (affirming court's discretion to decline to exercise jurisdiction over state claims when federal claims were dismissed two weeks before trial). After considering all of the relevant factors, the Court declines to exercise supplemental jurisdiction over plaintiff's state-law claims, and therefore Counts 4,5,6,7, and 8 of plaintiff's Amended Complaint are dismissed without prejudice.

II. INTERVENORS' CLAIMS

Intervenors' Complaint brings 3 counts against plaintiff and 2 counts against defendants. Intervenors claim that plaintiff and defendants violated intervenors' due process rights, and that plaintiff violated Minnesota law by failing to repair and maintain intervenors' apartments. The claims against plaintiff are not subject of motions for summary judgment. Counts 1 and 3 of intervenors' Complaint, however, mirror intervenors' claims against defendants in Counts 2 and 4. Thus, the following discussion applies to all counts of the intervenors' Complaint save the state-law failure-to-repair claim against plaintiff.

Count 2 of intervenors' Complaint alleges that defendants violated intervenors' 4th Amendment rights by failing to require plaintiff to give notice of impending inspections or by failing to give the notice themselves. Count 4 alleges that the defendants' violated intervenors' due process rights by failing to provide notice and an opportunity to be heard prior to conducting the March 20, 1997, inspections of intervenors' apartments.[4] Counts 1

[4] Intervenors' Memorandum in Support of the Motion for Summary Judgment also claims that intervenors' constitutional rights were violated by inspections in July of 1997, and again in the Fall of 1997. Intervenors' Complaint is dated April 10, 1997, and thus inspections

and 3 seek to hold plaintiff liable for allegedly allowing the City to violate intervenor's rights.

The 4th Amendment does not require that an governmental entity seeking to search a private dwelling give prior notice of such search. A requirement to that effect would certainly wreak havoc with law enforcement. Nor can the 4th amendment be read to require a pre-search hearing at which the occupant of the dwelling to be searched has an opportunity to challenge the grounds for a search. The Court has found no case that has discussed such a requirement with respect to a 4th Amendment search.

Instead, the 4th Amendment requires that the government either obtain a search warrant or seek the consent of the occupant of the dwelling before conducting a search. The Amendment also requires probable cause for the search,[5] but intervenors do not claim that the inspections at issue were not supported by probable cause. The Supreme Court in Camara made clear that the consent of the occupant of a dwelling to a search was all the Constitution required. See Camara, 387 U. S. at 528-29 ("[A] search of private property *without proper consent* is 'unreasonable' unless it has been authorized by

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performed after that date are not properly before the Court. If the intervenors had amended their Complaint to include the later inspections, however, the result would be the same: intervenors admit that, with respect to the July inspections, they consented to the entry of the inspector, and with respect to the Fall inspections, the City had valid search warrants to conduct the inspections. See Armstrong v. City of Columbia Heights, No. 98-CV-527. As discussed in the text, infra, intervenors' 4th Amendment rights cannot be violated by inspections to which they consented or for which a search warrant was obtained.

[5] Camara held that probable cause is satisfied with respect to administrative searches if the search is "reasonable," that is, justified by "reasonable legislative or administrative standards" such as the passage of time or the nature of the building to be inspected. Camara, 387 U. S. at 538.

a search warrant.")(emphasis added). Intervenors do not claim that the City inspectors who came to their doors in March of 1997 failed to seek their consent for the inspection. In fact, both intervenors admit that they consented to the inspection, and neither intervenor challenges the voluntariness of her consent. Knowing and voluntary consent to an administrative search that is supported by probable cause removes any possibility of a violation of the 4th Amendment. See, e.g., Reyes v. Edmunds, 472 F. Supp. 1218, 1223 (D. Minn. 1979); State v. Hanley, 363 N.W.2d 735, 738 (Minn. 1985). The intervenors' 4th Amendment rights were not violated by the March 20, 1997, inspections, and defendants are entitled to summary judgment on Counts 2 and 4.

Because intervenors' constitutional rights were not violated by the City's March 1997 inspections of intervenors' apartment, intervenors have no claim against plaintiff for allowing the constitutional inspections. Therefore, Counts 1 and 3 of intervenors' Complaint are dismissed.

As discussed in reference to plaintiff's state-law claims, when all federal claims have been dismissed, this Court may decline to exercise supplemental jurisdiction over the remaining state-law claims. For the reasons discussed supra Part I.B., the Court declines to exercise supplemental jurisdiction over intervenors' failure-to-repair claim against plaintiff. Thus, Count 5 is dismissed without prejudice.

III. MOTION FOR A PRELIMINARY INJUCTION

Plaintiff also brings a motion seeking preliminary and permanently to enjoin defendants from revoking its rental licenses for its refusal to pay the re-inspection fees required by the Code. To the extent that plaintiff is

claiming that any planned inspections are constitutionally invalid and that therefore it should not be required to pay for the inspections, plaintiff's motion fails. This Court has determined that the inspection procedure is valid, and plaintiff is not entitled to an injunction to enforce claims that have been dismissed.

Plaintiff attempts to raise new claims in support of its request for injunctive relief, namely that it is entitled to an injunction because the fees charged by the City are unreasonable, the fees are charged for inspections that are scheduled but not carried out, and the inspectors are not qualified to conduct the inspections. This is the first time any of these claims have appeared in plaintiff's pleadings; such claims were not presented in plaintiff's Amended Complaint. A preliminary injunction may not issue to enforce claims not raised by plaintiff's Amended Complaint. Because summary judgment has been granted to defendants on plaintiff's federal claims, and the remainder of plaintiff's claims have been dismissed, plaintiff cannot now amend the Amended Complaint to include these new claims against the inspection fees. Plaintiff's motion for an injunction is denied.

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS ORDERED** that:

1. Defendants' Motion for Summary Judgment [Docket No. 121] is GRANTED as to Counts 1,2,3, and 9 of plaintiff's Amended Complaint, and those Counts are DISMISSED WITH PREJUDICE;
2. Counts 4,5,6,7,and 8 of plaintiff's Amended Complaint [Docket No. 6] are DISMISSED WITHOUT PREJUDICE;
3. Plaintiff's Motion for Summary Judgment [Docket No. 130] is DENIED;

4. Defendant's Motion for Summary Judgment on intervenor's Complaint [Docket No. 104] is GRANTED as to Counts 1,2,3, and 4, and those Counts are DISMISSED WITH PREJUDICE;
5. Count 5 of intervenors' Complaint [Docket No. 26] is DISMISSED WITHOUT PREJUDICE.
6. Intervenors' Motion for Summary Judgment [Docket No. 113] is DENIED; and
7. Plaintiff's Motion for a Preliminary Injunction [Docket No. 137] is DENIED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: May 3, 1999

Harry H. MacLaughlin
United States District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
97-CV-604

Bennie Rozman and
Lynde Investment Company,

v. ORDER

City of Columbia Heights, Joseph
Sturdevant, Walt Fehst, Meg Jones,
Robert W. Reuttimann, Charles Kewatt,
Lowell G. Demars, Matt D. Field,
Gary Gorman, Rollin Goldsberry,

and

Susan Rodriguez and Sherri
Boniarczyk,
Intervenors.

This matter is before the Court on motion by intervenors, Susan Rodriguez and Sherri Boniarczyk, for preliminary injunction, and on plaintiffs' motion for declaratory and permanent injunction.

Based on the files, records, and proceedings herein, IT IS ORDERED that:

1. Intervenors' motion for preliminary injunction is denied.
2. There remain unresolved issues of law and fact; as a result, plaintiffs' motion for declaratory and permanent injunction is denied.

Dated: March 31st, 1998

JAMES M. ROSENBAUM
United States District Court Judge

Ord. 1291
Eff. 9-8-94

ARTICLE III

5A.301(1) Inspection and Enforcement

Section 1: Enforcement and Inspection Authority

The City Manager and his/her designated agents, as the Building Official who shall administer and enforce the provisions of this ordinance, may enter for the purpose of inspection, any rental dwelling (whether it be standing alone or as a unit in a larger complex or units), or premises, upon twenty-four (24) hours notice to the owner, occupant, manager, or person in charge of the rental dwelling or premises. Inspection shall be conducted during reasonable hours, upon request the Building Official shall present evidence of his/her official capacity to the owner, occupant or person in charge of a dwelling unit sought to be inspected. With regard to owned occupied single family dwelling units, the Building Official shall have the authority to enter onto the premises, during reasonable hours, for inspection of the exterior of the building.

Ord. 1276
Eff. 9-8-94

ARTICLE VI Penalties

5A.603 No person, firm, corporation or licensee shall refuse or fail to allow the Building Official to enter a dwelling or dwelling unit for purposes of inspection when authorized by this Chapter.

5A.608 No Occupant of any rental dwelling or rental dwelling unit shall fail to allow or refuse entry to the Building Official for purposes of inspection when authorized by this Code.

CITY OF COLUMBIA HEIGHTS
FIRE DEPARTMENT
555 MILL STREET NE
COLUMBIA HEIGHTS, MN. 55421
TELE: 782-2835

TO: LYNDE INVESTMENTS
9801 OAK RIDGE TRAIL
MINNETONKA, MN. 55305

ATTN: Bennie Rozman

DATE: December 9, 1996

Dear Mr. Rozman,

This notice is to inform you of the intent of the City of Columbia Heights to enforce all provisions of the City of Columbia Heights "HOUSING MAINTENANCE CODE", The provisions of the "UNIFORM BUILDING CODE" and their attachments.

The Fire Department, Inspections Division, has repeatedly requested that the following buildings and all rental units and common areas within those buildings receive the required annual licensing inspection. You have repeatedly denied inspectors access to these buildings.

In addition, per your agreement with the Columbia Heights City Council during a revocation hearing held the months of January-February, 1996, it is believed that a list of outstanding violation on several buildings still exist.

It is hereby ordered that the following list of properties shall be in total compliance with the requirements of the "HOUSING MAINTENANCE CODE" and "UNIFORM BUILDING CODE" prior to January 9, 1997. (SEE

ADDENDUM ISSUED BY CITY BUILDING OFFICIAL, MEL COLLOVA)

Failure to comply with ALL requirements of this order will result in a revocation hearing which will take place MONDAY, JANUARY 13, 1997, commencing at 7:00 p.m. or as soon after as the matter can be heard. Your tenants are being notified of this situation and will have the right to be heard at this hearing.

SEE FOLLOWING PAGES FOR ADDRESSES AND VIOLATIONS

Should you have any questions pertaining to these orders, please call.

Also enclosed, please find tenant notices. Please deliver these notices to your tenants.

RESPECTFULLY,

LOWELL G. DEMARS
Assistant Fire Chief
Enforcement Officer